

1992

Mark O. Walsh v. Judith Erickson, a.k.a. Jude Erickson; Peter Van Alstyne and Gerald Robinson : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Joyce Maughan; Attorney at Law.

John Walsh; Attorney at Law.

Recommended Citation

Legal Brief, *Walsh v. Erickson*, No. 920222 (Utah Court of Appeals, 1992).

https://digitalcommons.law.byu.edu/byu_ca1/3142

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

IN THE UTAH COURT OF APPEALS

SAH
DOCUMENT

-----00000000000000000000-----

K F U

59

.A10

DOCKET NO.

920222

MARK O. WALSH,

;

Plaintiff/Appellant,

;

Case No. 920222-CA

vs.

;

JUDITH ERICKSON, a.k.a. JUDE
ERICKSON; PETER VAN ALSTYNE
and GERALD ROBINSON,

;

Classification Fifteen

;

Defendants/Appellees.

;

-----00000000000000000000-----

PETITIONN FOR REHEARING

-----00000000000000000000-----

APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR

SALT LAKE COUNTY

JUDGE RICHARD MOFFAT, PRESIDING

JOYCE MAUGHAN
ATTORNEY AT LAW
455 SOUTH 300 EAST, SUITE 355
SALT LAKE CITY, UTAH
84111
Telephone: 359-5900

JOHN WALSH
ATTORNEY AT LAW
2319 FOOTHILL DRIVE, #270
SALT LAKE CITY, UTAH
84109
Telephone: 467-9700

FILED

APR 19 1995

COURT OF APPEAL

IN THE UTAH COURT OF APPEALS

-----000000000000000000-----

MARK O. WALSH,

;

Plaintiff/Appellant,

;

Case No. 920222-CA

vs.

;

JUDITH ERICKSON, a.k.a. JUDE
ERICKSON; PETER VAN ALSTYNE
and GERALD ROBINSON,

;

Classification Fifteen

;

Defendants/Appellees.

;

-----000000000000000000000000000000-----

PETITIONN FOR REHEARING

-----000000000000000000000000000000-----

APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR

SALT LAKE COUNTY

JUDGE RICHARD MOFFAT, PRESIDING

JOYCE MAUGHAN
ATTORNEY AT LAW
455 SOUTH 300 EAST, SUITE 355
SALT LAKE CITY, UTAH
84111
Telephone: 359-5900

JOHN WALSH
ATTORNEY AT LAW
2319 FOOTHILL DRIVE, #270
SALT LAKE CITY, UTAH
84109
Telephone: 467-9700

THERE IS NO BASIS FOR PREJUDGMENT INTEREST IN THIS ACTION.

This Court in its MEMORANDUM DECISION at page 2, stated the following:

PREJUDGMENT INTEREST

Walsh challenges the trial court's award of prejudgment interest. A trial court's award of prejudgment interest presents a question of law that we review for correctness. Andreason v. Aetna Casualty & Sur. Co., 848 P.2d 171, 177 (Utah App. 1993). Prejudgment interest is appropriately awarded if the damages can be fixed at a particular time and calculated with mathematical certainty. Shoreline Development, Inc. v. Utah County, 835 P.2d 207, 211 (Utah App. 1992). This is clearly a case in which damages are calculable with mathematical precision and prejudgment interest is properly awarded. Erickson's damages merely reimburse her for the tendered purchase price of Walsh's unsalable interest in the partnership for which she received nothing. Robinson and Van Alstyne's damages represent Walsh's liability for one half of the partnership debts. Walsh's liability in this regard is easily calculated by subtracting the proceeds from the sale of business assets from the existing debts, and dividing the amount in half. The information necessary to make these calculations was within the control of Walsh. We therefore affirm the trial court's award of prejudgment interest.

This Court is absolutely correct in the citations to the two cases of Andreason vs. Aetna Casualty & Sur. Co., 848 P.2d 171 (Utah App. 1993) and Shoreline Development, Inc. vs. Utah County, 835 P.2d 207, (Utah App. 1992), however Appellant respectfully submits that the analysis and holdings justify there by no prejudgment interest, rather than the other way around. Appellant includes a copy of each of the cases in the addendum.

In the case of Andreason, this Court stated on page 177 as follows:

In their cross-appeal, plaintiffs assert that the trial court erred in not awarding them prejudgment interest on the jury's damages award. The trial court's decision on plaintiffs' entitlement to prejudgment interest presents a question of law which we review for correctness. *Vali Convalescent & Care Insts. v. Division of Health Care Fin.*, 797 P.2d 438, 444 (Utah App. 1990); *Hermes Assocs. v. Park's Sportsman*, 813 P.2d 1221, 1223 (Utah App. 1991). Consequently, "we need not accord any particular

deference to the decisions below.” *Vali*, 797 P.2d at 444 (citing *Hurley v. Board of Review*, 767 P.2d 524, 526-27 (Utah 1988) (agency decision); *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985) (trial court decision)).

Plaintiffs argue that by establishing the threshold facts of promise, reliance and damage, they created an entitlement to full compensation for their expenses, including interest on the money expended six years previously. According to plaintiffs, their right to full compensatory damages includes prejudgment interest as matter of law because (1) their damages were sufficiently fixed at the time that they incurred expenses to repair their home, and (2) prejudgment interest is appropriate because “the damages claimed were with reference to the value of the repair of damaged property.”

The Utah Supreme Court first discussed the rationale behind prejudgment interest in *Fell v. Union Pacific Ry. Co.*, 32 Utah 101, 88 P. 1003, 1005-06 (1907). The *Fell* court stated that because awarding damages at law was intended to return a plaintiff to the status quo, prejudgment interest could be available where necessary to accomplish full compensation. *Id.* In Utah, prejudgment interest may be awarded in situations where the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time. *Bjork v. April Industries, Inc.*, 560 P.2d 315, 317 (Utah 1977), *cert. denied*, 431 U.S. 930, 97 S.Ct. 2634, 53 L.Ed.2d 245 (1977). Although damages may be unliquidated, they must be calculable through a mathematically certain procedure allowing the court of the jury to fix the amount by following “fixed rules of evidence and known standards of value ... rather than be[ing] guided by their best judgment in assessing the amount” or evaluating elements lacking fixed standards by which to measure their value. *Fell*, 88 P. at 1007; *Price-Orem v. Rollins, Brown & Gunnell*, 784 P.2d 475, 483 (Utah App. 1989). If sufficient certainty exists, courts should allow interest from the time when damages became fixed, rather than from the date of the judgment. *Bjork*, 560 P.2d at 317. However, “where ‘damages are incomplete and are peculiarly within the province of the jury to assess at the time of trial,’” then prejudgment interest is inappropriate. *Price-Orem*, 784 P.2d at 483 (quoting *Fell*, 88 P. at 1006).

Then again on page 178, this Court went on and stated:

... In assessing this amount, the fact finder is guided by its best judgment, not a known standard of value. ...

Furthermore, in contrast to a tort action for property damage, the recovery properly awarded under a promissory estoppel theory reflects the extent of reliance. To separate the damage for which defendant must accept responsibility from expenses which would have occurred in the absence of defendant’s promise requires the determination of a fact-finder. Factual evaluation of this type lacks mathematical certainty prior to final determination and requires case by case analysis. When “the amount of the damage must be ascertained and assessed by the trier of the fact at the

trial,” prejudgment interest is inappropriate. *Price-Orem*, 784 P.2d at 482 (quoting *Bjork*, 560 P.2d at 317).

Then in *Shoreline*, this Court stated on page 211 as follows:

The determining factor in awarding prejudgment interest is whether the damages upon which prejudgment interest is sought can be calculated with mathematical certainty. See, e.g., *Jack B. Parson Constr. Co. v. State*, 552 P.2d 107, 108-09 (Utah 1976) (amount due under the contract was ascertainable by calculation). “A court can award prejudgment interest only when the loss is fixed at a particular time and the amount can be fixed with accuracy.” *Smith v. Linmar Energy Corp.*, 790 P.2d 1222, 1225 (Utah App.1990). If the jury must determine the loss by using its best judgment as to valuation rather than fixed standards of valuation, prejudgment interest is inappropriate, *Id.* See *Bjork v. April Indus., Inc.*, 560 P.2d 315, 317 (Utah) *cert. denied*, 431 U.S. 930, 97 S.Ct. 2634, 53 L.Ed.2d 245 (1977) (where damages cannot be calculated with mathematical accuracy, the *amount* of the damage must be ascertained and assessed by the trier of fact and prejudgment interest is not allowed); *Fell v. Union Pac. Ry. Co.*, 32 Utah 101, 88 P. 1003, 1006 (1907) (“In all . . . cases where the damages are incomplete and are peculiarly within the province of the jury to assess at the time of the trial, no interest is permissible.”)

The Utah Supreme Court recently indicated that the lack of mathematical certainty generally prevents an award of prejudgment interest in equity claim.

A survey of our cases where prejudgment interest was awarded indicates that interest has been allowed in actions for damage to personal property, in actions brought on a written contract and in an action to recover a liquidated over-payment of water subscription charges. In many of these cases, we stressed that the loss had been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with well-established rules of damages. No case has been cited to us where we have allowed prejudgment interest in an action such as the instant suit of this nature. . . invokes consideration of the principles of equity which address themselves to the conscience and discretion of the trial court.” In view of the highly equitable nature of this action where the court has discretion in determining the amount, if any, to be [awarded to the plaintiff], we find no error in the denial of prejudgment interest.

Appellant submits that had this been a case where the amounts had been ascertainable early on then prejudgment interest may well have been recoverable, however, there is absolutely no basis in the evidence to suggest that the amounts

claimed by the Counter claimants (Appellees) were ever ascertainable, even through the end of trial.

The first reason why this is so, is because the trier of fact had to determine appropriate setoffs to be applied to the claims made by the Appellees in this action.

On page 46 of the Transcript, during the first day of testimony, Peter Van Alstyne testified as follows: (Note page 46 in Addendum)

Q. And did you in fact distribute to her (Jude) some of the unsold assets of the partnership?

A. Right.

Again on pages 121 and 122, Peter Van Alstyne testified that he distributed personal property to Jude Erickson, to Gerald Robinson and to himself: (Note pages 121 and 122 in the Addendum)

Q. Okay. Then when you finally sold it the following June of '86, you said that you didn't sell all the assets, that some of the assets you kept and some you gave to Erickson.

A. These are assets that Video U.S.A. did not want to buy. They could not use them.

Q. What were they?

A. Well, there was a T.V. and then some Beta movies that were damaged, and a video camera that was broken. And I think a cash register and some office supplies. Those, I gave to Jude. We purchased two video recorders.

Q. Who is "we"?

A. My wife and I. So, we made out a check and purchased the two video recorder. I took the T.V., because the video store had purchased out of my own pocket and I paid a carpet cleaning bill earlier that spring. And I

reimbursed myself for that with some other supplies.

Q. Let's move on to the proceeds from this contract of sale on June, '86, with Video U.S.A.

A. Uh huh (affirmative).

Q. Who received those proceeds?

A. Well, Gerald and I.

Q. The reason I'm asking is, I heard Mr. Crawley ask you, and Robinson had gotten all of the proceeds from that; is that true?

A. Well, I'm sorry, no. I've taken Gerald and I've split them. I used my proceeds to pay my legal costs since Mark initiated this action against me.

As noted in the Memorandum Decision, at page 2, this Court stated:

Walsh's liability in this regard is easily calculated by subtracting the proceeds from the sale of business assets from the existing debts, and dividing the amount in half. The information necessary to make these calculations was within the control of Walsh.

Appellant respectfully submits that this is absolutely not so for two reasons:

(1) As noted above the lower Court first had to determine the setoffs of the personal property taken by each of the remaining principals, after the sale of the assets, and

(2) The Appellees themselves did not ever ascertain the amounts they claimed to be due and owing, until they literally were preparing for trial in this matter.

As to the first argument, it is unchallenged that the principals took substantial assets when the business was sold. As noted above, they each took items of personal

property, and in the case of Peter Van Alstyne and Gerald Robinson, they each took cash in addition.

These individuals surely can not take these items, and then double dip against Mr. Walsh, and claim that he must pay the remaining balance after the sale of the business.

Even if these many items were of little value considered separately, still the lower Court had to determine the appropriate setoff that Appellant would be entitled to, in the aggregate, before the remaining amount that would be due and owing would be mathematically calculable.

These setoffs for the many items of personal property taken of used merchandize, etc. were clearly not something that Appellant could have determined in advance of the trial itself, and hence the analysis of *Andreason*, is particularly appropriate.

Furthermore, in contrast to a tort action for property damage, the recovery properly awarded under a promissory estoppel theory reflects the extent of reliance. To separate the damage for which defendant must accept responsibility from expenses which would have occurred in the absence of defendant's promise requires the determination of a fact-finder. Factual evaluation of this type lacks mathematical certainty prior to final determination and requires case by case analysis. When "the amount of the damage must be ascertained and assessed by the trier of the fact at the trial," prejudgment interest is inappropriate. *Price-Orem*, 784 P.2d at 482 (quoting *Bjork*, 560 P.2d at 317).

In *Andreason* this Court determined that even though certain items of personal property, and cabinets, appliances, etc. could be ascertained, the whole amount was still very much in question, because the lower Court had to decide what values would

be allowed and which ones would not.

This is particularly so in the case before this Court, as one can not determine what the setoffs were going to be for unidentified personal property which were admittedly received by each of the principals.

Hence, the case law clearly stands for the notion that when the amount can be mathematically determined then prejudgment interest is appropriate but where it is not, then prejudgment interest is not appropriate.

In this case, it was clearly the later, and hence no prejudgment interest would be allowed as a matter of law.

As to the second point, that the Appellees themselves did not ever ascertain the amounts they claimed to be due and owing until they literally were preparing for trial, is born out on page 312 of the transcript for April 25, 1989, which is included in the addendum.

Appellees had submitted inconsistent testimony on what the principal amount was due, and then Peter Van Alstyne states to his own attorney:

Q. Which one is right, this one or the one Mary Ann prepared?

A. I prepared this just as a general ballpark when I was consulting with you as to what at the very least would be the outstanding debt that I am in the hole, out these dollar amounts. At the very least. I didn't really work into any consideration with respect to interest accruing there. I was just trying to get a general idea.

It is not only clear that the Appellees themselves did not ascertain what amounts they were claiming prior to trial, even the Judge after all of the evidence was in, asked

for clarification from the Appellees as to what amounts they claimed were due and owing. As noted on page 313 of the Transcript for April 25, 1989, Judge Moffat made the following comment after the trial was over, and he was taking the matter under advisement. (Note the same in the addendum)

THE JUDGE: I would like a road map. I think it's as I said in chambers, it's fairly clear as to the position of the plaintiff in relation to the relief sought. I'm not now that clear in relation to the dollar and cents on the claim for relief under the counterclaim, because the evidence has altered it somewhat from the claims as set forth in the pleadings but as to the plaintiff's claim that there is a change or alteration in those figures, I would like there to be all the evidence out and in the open to tell me what our bottom line is.

Hence, Appellant respectfully submits that the amounts claimed to be owed by the Appellees was anything but mathematically calculable.

Hence, there is absolutely no basis for prejudgment interest in this action.

Lastly, this Court makes a certain point in its MEMORANDUM DECISION, that bears special consideration.

This Court stated, "The information necessary to make these calculations was within the control of Walsh."

Appellant respectfully submits that, even should this Court completely disregard all of the arguments stated above, there is absolutely no evidence whatsoever that this statement of fact, can ever be born out in the record.

The record on the other hand states that this information was in fact never disclosed or otherwise made available to Mr. Walsh. Note page 46 of the Transcript, which is included in the addendum, wherein Mr. Van Alstyne stated:

Q. Mr. Van Alstyne, you testified that you did not confer with Mr. Walsh about the sale of the business beginning in the Fall of 1985, is that correct?

A. Yeah.

Appellant respectfully submits that there is absolutely no basis for an award of prejudgment interest.

Appellant respectfully submits that this determination is a critical one to him, in light of this fact that the total judgment is reduced by the sum of \$12,515.22 should this Court disallow prejudgment interest, as well as the post judgment interest on the same.

CONCLUSION

Appellant respectfully prays that this Court will carefully consider the law as outlined so clearly by this Court in the two cases cited in the MEMORANDUM DECISION, which are included in the addendum.


It can not be disputed that there was absolutely no way for the Appellant to ascertain the amount due to the Appellees, as they themselves stated under oath that they had not even determined the same until they were preparing for trial, and then even during the trial they changed their position, and as noted by Judge Moffat, he could not follow what their bottomline was, and requested assistance of Counsel to clarify.

Lastly, even if this Court does not change its prior ruling regarding prejudgment interest, it can not be said that this appeal is without merit, and Appellant respectfully

requests that no attorneys fees on appeal be allowed.

Hence, Appellant respectfully requests that this Court reverse on the issue of prejudgment interest, and remand the matter to the District Court to determine the amounts owing in the judgment, with no award of Attorneys fees on appeal. Counsel for the Plaintiff hereby certifies that this Petition is presented in good faith and not for delay.


Respectfully submitted this 19th day of April, 1995.



JOHN WALSH
ATTORNEY FOR THE APPELLANT

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed two true and correct copies of the foregoing PETITION FOR REHEARING, to the Defendants, by mailing the same in the United States Mail, addressed to JOYCE MAUGHN, 455 SOUTH 300 EAST, THIRD FLOOR, SALT LAKE CITY, UTAH, 84111, dated this 19th day of April, 1995.



JOHN WALSH
ATTORNEY AT LAW

**SHORELINE DEVELOPMENT, INC., a
Utah corporation, Milton Jones, and
Milton Hanks, Plaintiffs, Appellees,
and Cross-Appellants,**

v.

**UTAH COUNTY and American Fork
City, Defendant, Appellant, and
Cross-Appellee.**

No. 910241-CA.

Court of Appeals of Utah.

July 10, 1992.

Alleged agent brought suit against county for services rendered in obtaining dredging pumps intended to be used by county on lake. The Fourth District Court, Utah County, George E. Ballif, J., entered judgment on jury verdict in favor of agent on unjust enrichment claim. County appealed and agent cross appealed. The Court of Appeals, Bench, P.J., held that: (1) claim for unjust enrichment was an equitable claim not barred by the Governmental Immunity Act, and (2) agent was not entitled to award of prejudgment interest.

Affirmed.

1. Appeal and Error ⇨173(2)

County's claim that corporate powers of county statute barred claim by alleged agent for unjust enrichment as result of its services in aiding county in obtaining dredge, which claim was not raised at trial, would not be considered for first time on appeal. U.C.A.1953, 17-4-5.

2. Counties ⇨208

Claim against county by agent for unjust enrichment arising from its services in aiding county to obtain dredge was an equitable claim not barred by the Governmental Immunity Act, despite county's contention that it was acting in effort to control flooding. U.C.A.1953, 63-30-3.

3. Counties ⇨223

Jury's finding that county received benefit of \$94,000, as result of agent's ser-

835 P.2d—7

vices in aiding county in obtaining dredge was supported by sufficient evidence, even though county never made use of dredge pumps after removing them from dredge because it was unable to find way to retrofit dredging pumps for use; county failed to marshal evidence in support of \$94,000 award, but only marshaled evidence showing efforts of agent and attempted to counter evidence with some evidence of efforts expended by county and state, in apparent attempt to show that agent was not sole party involved in obtaining dredge.

4. Trial ⇨307(3)

Trial court was not required to grant requests by jury during deliberations that deposition of witness, who had been unavailable to testify at trial, and whose deposition had been read to jury, be sent to jury room. Rules Civ.Proc., Rule 47(m).

5. Interest ⇨39(2.20)

Agent, which obtained unjust enrichment award from county for agent's services in obtaining dredge, was not entitled to award of prejudgment interest; jury had discretion to award interest as part of equity judgment, so that there was risk of double recovery.

6. Interest ⇨39(2.15)

Determining factor in awarding prejudgment interest is whether damages upon which interest is sought can be calculated with mathematical certainty.

7. Interest ⇨39(2.15)

If jury must determine loss by using its best judgment as to valuation rather than fixed standards of valuation, prejudgment interest is inappropriate.

8. Interest ⇨39(2.20)

Prejudgment interest must be sought directly as damages in unjust enrichment cases, if at all, and may not be subsequently added by trial court to jury's award for unjust enrichment.

Kay Bryson and Jeril B. Wilson, Provo, for appellant.

Gregory J. Sanders, Salt Lake City, for appellees.

Before BENCH, BILLINGS and
RUSSON, JJ.

AMENDED OPINION ON
REHEARING *

BENCH, Presiding Judge:

Shoreline Development, Inc., brought suit against Utah County for services rendered by Shoreline in obtaining dredging pumps intended to be used by the County on Utah Lake. The trial court entered a partial directed verdict in the County's favor dismissing Shoreline's contract claims. Shoreline's unjust enrichment claim, however, was sent to the jury. The jury found in Shoreline's favor and awarded it \$94,000 for the services rendered. The County appeals and Shoreline cross-appeals. We affirm.

FACTS

In 1985, Shoreline entered into an agreement with American Fork City¹ to operate a boat harbor the City owned on Utah Lake, which is located in Utah County. It was determined that a dredge was necessary to develop the harbor. Shoreline began to investigate ways of obtaining a dredge and ended up working with William Arseneau, the Director of State Surplus Property. They identified certain surplus federal government dredges that could be released for use on this project. The principals of Shoreline spent many hours working on the project in 1985. Beginning in the early part of 1986, they were each working on the project an estimated 50 to 60 hours per week.

In mid-March, 1986, a meeting was held with the Utah County Commission to discuss the work being done by Shoreline for American Fork. All three of the county commissioners attended, as well as Clyde Naylor, the county engineer. During the meeting, Shoreline outlined a proposal whereby it would obtain a dredge for the County and be given the exclusive rights to operate it on Utah Lake. Shoreline indicated it was focusing its efforts upon the

dredge "*Harding*" which belonged to the Army Corps of Engineers and was located in Portland, Oregon. The dredge had two large dredging pumps that could be salvaged for the County. The Commission took a voice vote and authorized expenditure of \$2,000 to get the project going.

Immediately after the meeting, Shoreline prepared a letter memorializing the agreement that had been reached with the commissioners. That letter was hand carried to the Commission the next day. When the written memorialization of the agreement was delivered, a check for \$2,000 was given to Shoreline. No express written contract was executed by the parties.

Shoreline then moved forward under the understanding it had an agreement with the County to obtain a dredge and set up business operations on Utah Lake. Shoreline presented the County with written reports concerning its investigation. Shoreline again met with two of the county commissioners to discuss the project in general, and the dredge *Harding* in particular. Shoreline claims that the commissioners again took an express oral vote and specifically authorized Shoreline to proceed with obtaining a dredge for the County. One of the principals of Shoreline remembers a commissioner specifically stating that no bid process was required in order for the agreement to be made.

After this second meeting with the commissioners, Shoreline continued to work towards obtaining the dredging pumps off the *Harding* for the County. In early June of 1986, it became known that the dredging pumps were going to make it to Utah. The principals of Shoreline then met with the county commissioners and other officials, including the mayor of American Fork. They were totally surprised in that meeting when the commissioners thanked them for their efforts in obtaining the dredging pumps and then told them that there was no deal in place. One of the commissioners suggested that Shoreline submit a bill.

* Replaces this court's opinion of the same name filed on May 19, 1992 (187 Utah Adv.Rep. 26).

1. American Fork has settled with Shoreline and is not a party to this appeal.

After Shoreline had been excused from the deal, the government paperwork was completed and the dredging pumps were delivered to the County. The county's engineer signed one document acknowledging that the value of the dredge was \$6,022,563. County commissioner Gary Anderson, in accepting the dredge, also signed a document acknowledging its value at \$6,022,563.

Shoreline presented a bill for \$250,000 to the County for the value of its services in obtaining the dredge. The County refused to pay the bill and Shoreline brought suit. Shoreline claimed the County was liable under an express contractual agreement that Shoreline would obtain a dredge for the County. In the alternative, Shoreline claimed that if there was no express contract, the County was liable under an implied-in-fact contract as evidenced by the work actually performed by Shoreline. As a final alternative, Shoreline claimed that the County was liable for the unjust enrichment it received from Shoreline's efforts.

At the close of Shoreline's evidence, the County moved for a directed verdict as to the express contract and the implied-in-fact contract claims. The County argued that it was protected from any contractual claims because it did not act in accordance with state code or its own customary practices in dealing with Shoreline and therefore it could not be bound by those acts. The County conceded at that time that the unjust enrichment claim could properly be presented to the jury. The trial court agreed and granted a directed verdict in favor of the County on Shoreline's first two claims. The County then rested, without putting on any case of its own, and the unjust enrichment claim was sent to the jury. The jury awarded Shoreline \$94,000 for services rendered. Shoreline then re-

quested prejudgment interest on the \$94,000, but the trial court denied the request.

The County appeals, claiming it is shielded from the unjust enrichment claim by Utah Code Ann. § 17-4-5 (1991) (corporate powers of a county), and by Utah Code Ann. § 63-30-3 (1989) (the Utah Governmental Immunity Act).² The County also challenges the sufficiency of the evidence as to whether it received a benefit from Shoreline's efforts. And finally, the County claims that the trial court erred in refusing to allow the jury to take into the jury room a deposition that had been read into evidence. Shoreline cross-appeals the denial of prejudgment interest, claiming that interest may be awarded in an unjust enrichment case.³

UNJUST ENRICHMENT

Defenses

[1] The County asserts that Shoreline's unjust enrichment claim is precluded by Utah Code Ann. § 17-4-5 (1991). This defense was not raised below. We will not address issues raised for the first time on appeal. *See Zions First Nat. Bank v. National Am. Title Ins. Co.*, 749 P.2d 651, 654 (Utah 1988).

[2] The County also asserts that Shoreline's unjust enrichment claim is barred by the Governmental Immunity Act, Utah Code Ann. § 63-30-3 (1989), because the County was acting in an effort to control flooding. The supreme court has clearly held that "[g]overnmental immunity may not be used as a defense to equitable claims...." *Board of Educ. of Granite School Dist. v. Salt Lake County*, 659 P.2d 1030, 1036 (Utah 1983) (quantum meruit claim upheld where county "acquiesced in the receipt of the benefit").⁴ Shoreline's

judgment, we need not address the trial court's legal conclusions as to the first two claims.

2. The Governmental Immunity Act has since been amended, but without change to the relevant language. *See* section 63-30-3(3) (Supp. 1991).

3. Shoreline also cross-appeals the dismissal of its contract claims but only requests that we address these issues if we reverse the unjust enrichment award. Inasmuch as we affirm the

4. *See, e.g., Concrete Products Co. v. Salt Lake County*, 734 P.2d 910, 911-12 (Utah 1987) (quantum meruit claim was recognized as permissible, but claim failed for lack of evidence that county was directly benefitted); *Breitling Bros. Constr., Inc. v. Utah Golden Spikers, Inc.*, 597 P.2d 869, 872 (Utah 1979) (remanded for further

unjust enrichment claim is therefore not barred by the Governmental Immunity Act.

Sufficiency of the Evidence

[3] The County challenges the sufficiency of the evidence to support a finding that the County received a benefit in the amount of \$94,000. In particular, the County argues that the benefit of Shoreline's services could not have been \$94,000 because the County received no "net benefit" from obtaining the dredge. After the dredging pumps were removed from the dredge, the County never made use of them. The County argues that it was simply unable to find a way to retrofit the dredging pumps for use on Utah Lake. In fact, the federal government ultimately repossessed them. The County errs, however, in focusing on the "net benefit" of the entire transaction. The appropriate benefit upon which Shoreline's unjust enrichment claim is based, and upon which damages must be awarded, is the service rendered by Shoreline in obtaining the dredge. The fact that following the receipt of this benefit the County was unsuccessful in making a profitable use of the dredge is immaterial to the valuation of Shoreline's services. The County, not Shoreline, bore the risk the venture might fail.

The County has failed to satisfy its burden of marshaling the evidence in support of the jury's holding that it received a benefit worth \$94,000. *Hodges v. Gibson Prod. Co.*, 811 P.2d 151, 156 (Utah 1991) (appellant must set out all evidence that supports jury verdict, including all valid inferences, and demonstrate "that reasonable persons would not conclude that the evidence supports the verdict"). The County does marshal the evidence showing the efforts of Shoreline and attempts to counter it with some evidence of the efforts expended by the County and the State in an

proceedings regarding quantum meruit claim against the state when trial court dissuaded plaintiff from presenting claim).

5. Rule 47(m) provides, in relevant part and with our emphasis, "[u]pon retiring for deliberation the jury may take with them the instructions of the court and all exhibits and all papers which

apparent attempt to show that Shoreline was not the sole party involved in obtaining the dredge. The primary focus of the County's marshaling, however, is on whether it received any "net benefit" from the venture. The County has not marshaled the evidence in support of the \$94,000 award. Nowhere in the County's attempt to marshal is there any indication that the services rendered in obtaining the dredge were not worth \$94,000. We therefore do not disturb the jury award. *See, e.g., State v. Christofferson*, 793 P.2d 944, 947 (Utah App.1990) (when appellant fails to marshal, reviewing court presumes that the holding is adequately supported by the clear weight of the evidence).

DEPOSITION

[4] During its deliberations, the jury requested that the deposition of William Arseneau be sent into the jury room. Due to the unavailability of Arseneau, his deposition had been read in its entirety to the jury during the trial. The trial court refused to allow the deposition to be sent to the jury room because Arseneau's written testimony might receive more weight than other oral testimony. The County argues that the trial court erred in not allowing the jury to review the deposition.

Under Utah Rule of Civil Procedure 47(m), the jury may not take depositions with them when they deliberate.⁵ The question of whether written testimony should be allowed in the jury room has already been addressed in *State v. Solomon*, 96 Utah 500, 87 P.2d 807, 811 (1939), wherein the supreme court held: "The law does not permit depositions or witnesses to go to the jury room."⁶

In light of Rule 47(m) and the supreme court's unequivocal holding that depositions are not permitted in the jury room, we find no error.

have been received as evidence in the cause, *except depositions...*"

6. The supreme court reaffirmed its holding in *Solomon* in *State v. Davis*, 689 P.2d 5, 14-15 (Utah 1984).

PREJUDGMENT INTEREST

[5] In its cross-appeal, Shoreline challenges the trial court's refusal to award prejudgment interest on the \$94,000 unjust enrichment award. Shoreline asserts that prejudgment interest should be available because an unjust enrichment claim falls somewhere between the poles of express contract claims, where prejudgment interest is often allowed, and tort claims, where prejudgment interest is seldom allowed. In particular, Shoreline asserts that the similarity between an unjust enrichment claim and a contract claim weighs in favor of awarding prejudgment interest. Shoreline's reliance on the nature of the claim, however, is misplaced.

[6,7] The determining factor in awarding prejudgment interest is whether the damages upon which prejudgment interest is sought can be calculated with mathematical certainty. See, e.g., *Jack B. Parson Constr. Co. v. State*, 552 P.2d 107, 108-09 (Utah 1976) (amount due under the contract was ascertainable by calculation). "A court can award prejudgment interest only when the loss is fixed at a particular time and the amount can be fixed with accuracy." *Smith v. Linmar Energy Corp.*, 790 P.2d 1222, 1225 (Utah App.1990). If the jury must determine the loss by using its best judgment as to valuation rather than fixed standards of valuation, prejudgment interest is inappropriate, *Id.* See *Bjork v. April Indus., Inc.*, 560 P.2d 315, 317 (Utah) cert. denied, 431 U.S. 930, 97 S.Ct. 2634, 53 L.Ed.2d 245 (1977) (where damages cannot be calculated with mathematical accuracy, the amount of the damage must be ascertained and assessed by the trier of fact and prejudgment interest is not allowed); *Fell v. Union Pac. Ry. Co.*, 32 Utah 101, 88 P. 1003, 1006 (1907) ("In all ... cases where the damages are incomplete and are peculiarly within the province of the jury to assess at the time of the trial, no interest is permissible.").

The Utah Supreme Court recently indicated that the lack of mathematical certainty generally prevents an award of prejudgment interest in equity claims.

A survey of our cases where prejudgment interest was awarded indicates that interest has been allowed in actions for damage to personal property, in actions brought on a written contract, and in an action to recover a liquidated overpayment of water subscription charges. In many of these cases, we stressed that the loss had been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with well-established rules of damages. No case has been cited to us where we have allowed prejudgment interest in an action such as the instant case, which is for equitable relief. "A suit of this nature ... invokes consideration of the principles of equity which address themselves to the conscience and discretion of the trial court." In view of the highly equitable nature of this action where the court has discretion in determining the amount, if any, to be [awarded to the plaintiff], we find no error in the denial of prejudgment interest.

Bellon v. Malnar, 808 P.2d 1089, 1097 (Utah 1991) (citations omitted) (quoting *Fullmer v. Blood*, 546 P.2d 606, 610 (Utah 1976)).

Shoreline asserts that there is a public policy ground for awarding interest in equity cases despite the uncertainty of the damages. While we recognize Shoreline's concern that injured parties be made whole, we find that this concern is adequately addressed by reason of the fact that equity plaintiffs may claim lost interest as part of their damages. *Uinta Pipeline Corp. v. White Superior Co.*, 546 P.2d 885, 887 (Utah 1976) (where justice and equity require, interest may be awarded as part of the damages). Since a jury has discretion to award interest as part of an equity judgment, there is a risk of double recovery if prejudgment interest may be added to a jury's equity award by the trial court who does not know whether the jury's award covers interest. In order to prevent such double recovery, we presume that if the claimant was entitled to any interest, it was awarded by the jury as part of the equity award.

[8] Given the risk of double recovery, and in light of the supreme court's ruling in *Bellon*, we hold that prejudgment interest must be sought directly as damages in unjust enrichment cases, if at all. Prejudgment interest may not be subsequently added by a trial court to a jury's award for unjust enrichment. We therefore find no error in the trial court's refusal to award Shoreline prejudgment interest on the \$94,000 judgment awarded by the jury.

CONCLUSION

As to the County's appeal of the judgment for unjust enrichment, the County failed to raise its statutory defense below

so we do not address it for the first time on appeal. Furthermore, the county may not raise governmental immunity as a defense against an equitable claim for unjust enrichment. As to the assertion that the trial court erred in refusing to allow the deposition in the jury room, we find no error. As to Shoreline's cross-appeal requesting prejudgment interest, we also find no error. The judgment is therefore affirmed.

BILLINGS and RUSSON, JJ., concur.



rably harmed by the violation, the violation was innocent, defendants' cost of removal would be disproportionate and oppressive compared to the benefits plaintiffs would derive from it, and plaintiffs can be compensated by damages.

Id. (citing *Papanikolas Bros. Ent. v. Sugarhouse Shopping Ctr. Ass'n*, 535 P.2d 1256 (Utah 1975)).

[14] In this case, we find that substantial evidence relevant to this criteria supports the trial court's decision to refuse to order the removal of the McNeils' encroachment. Plaintiffs' actions and advance notice indicate that they would not be irreparably harmed by the encroachment. Their predecessors in interest willingly purchased Lots 12 and 13 with the understanding that the lots extended only to the center line of the river, and plaintiffs made their offer to purchase with that same understanding. On the other hand, the McNeils are innocent possessors of the encroaching residence who neither constructed the house nor knew of its encroachment at the time of their purchase. While their home would be greatly damaged or totally destroyed by removal, plaintiffs' intended use and enjoyment of the undisputed remainder of the property would not be significantly hindered by allowing the encroachment to remain. Based on this evidence, we find that the trial court did not abuse its discretion in determining that the balance of equities weighed in favor of compensating plaintiffs through damages for the loss of the disputed piece of land.

Plaintiffs also claim that if equity would not require the removal of the McNeils' home, the trial court still erred by allocating the entire disputed portion to them. Plaintiffs claim that the court acted arbitrarily in returning the boundary line to the center of the Santa Clara River and erroneously neglected to consider what portion of plaintiffs' disputed real property was actually necessary to accommodate the McNeils' encroachment. We note, however, that plaintiffs' own expert provided the calculation of the square feet occupied by the McNeils' encroachment and that plain-

tiffs offered no evidence regarding any lesser portion of land for the court's consideration. It was, therefore, within the trial court's discretion to use plaintiffs' expert's testimony in determining what segment of land should remain with the McNeils.

CONCLUSION

As a matter of law, the trial court did not err in considering the Santa Clara River an adequate monument for purposes of boundary by acquiescence. Because the Zanes presented sufficient evidence to meet all elements of that doctrine, the court did not abuse its discretion in quieting title of the disputed land in their favor. It also acted within its discretion in refusing to require the removal of the McNeils' encroachment and then awarding plaintiffs damages to compensate them for the land whose title the court ordered quieted in the McNeils.

We affirm.

BILLINGS and GARFF, JJ., concur.



**Derek ANDREASON and Dana Andreason, Plaintiffs, Appellees,
and Cross-Appellants,**

v.

**AETNA CASUALTY & SURETY COMPANY, Defendant, Appellant, and
Cross-Appellee.**

No. 910615-CA.

Court of Appeals of Utah.

Feb. 18, 1993.

Homeowners whose property was damaged by fire brought action against insurer, seeking to recover damages based upon promissory estoppel theory. The District Court, Salt Lake County, Anne M. Stirba, J., following jury's award of damages, refused to subject award to remittitur or

order new trial, but also refused to grant prejudgment interest. On cross appeals, the Court of Appeals, Greenwood, J., held that: (1) homeowners presented sufficient evidence to allow jury to determine their entitlement to promissory estoppel damages and to calculate value of damages, and denial of new trial or remittitur was not unreasonable, but (2) even if plaintiffs' recordation of expenses accurately reflects value of their personal expenditures, it does not provide known standard of value for measuring damages in promissory estoppel case, as required for award of prejudgment interest.

Affirmed.

Orme, J., concurred in result only.

1. Jury ⚡14(1)

"Promissory estoppel" is equitable claim for relief which is normally tried to bench.

See publication Words and Phrases for other judicial constructions and definitions.

2. New Trial ⚡76(1)

Damage assessment is peculiarly jury function and, thus, trial courts should exercise caution in setting aside verdict and ordering new trial on basis of excessive damages.

3. New Trial ⚡76(1)

Trial court enjoys broad discretion in deciding whether to set aside verdict and order new trial on basis of excessive damages, as long as its grounds for granting remittitur or new trial fit one of seven specified in rule. Rules Civ.Proc., Rule 59.

4. New Trial ⚡74, 77(1)

Trial court should review propriety of damages award and grant new trial only where it is obvious that jury lacked reasonable basis for its decision, acted with prejudice or passion, or disregarded competent evidence. Rules Civ.Proc., Rule 59.

5. Estoppel ⚡85

Promissory estoppel claim should not fail for lack of damages on sole basis that plaintiffs received benefit.

6. Estoppel ⚡118

Homeowners presented sufficient evidence to allow jury to determine their entitlement to promissory estoppel damages and to calculate value of damages in action against insurer which had misrepresented that policy covered fire damage, and denial of new trial or remittitur was not unreasonable; there was evidence from which jury could reasonably infer that adhering to insurer's plan of immediate professional repair required homeowners to forego their option of gradual self-help and necessitated additional expenses, and allocation of approximately 90% of homeowner's expenses as extent of damages due to detrimental reliance was not contrary to law.

7. Damages ⚡184

Award of damages required that plaintiff prove fact of damages by preponderance of evidence and amount of damages by approximations and projections that rise above mere speculation.

8. Appeal and Error ⚡842(11)

Trial court's decision on plaintiffs' entitlement to prejudgment interest presented question of law which appellate court reviewed for correctness.

9. Interest ⚡39(2.15)

Prejudgment interest may be awarded in situations where damage is complete, loss can be measured by facts and figures, and amount of loss is fixed as of particular time.

10. Interest ⚡39(2.15)

Although prejudgment interest may be awarded even if damages are unliquidated, damages must be calculable through mathematically certain procedure allowing court or jury to fix amount by following fixed rules of evidence and known standards of value, rather than being guided by their best judgment in assessing amount or evaluating elements lacking fixed standards by which to measure their value.

11. Interest ⚡39(1)

If sufficient certainty exists, courts should allow interest from time when damages became fixed, rather than from date of judgment.

12. Interest \S 39(2.20)

Even if plaintiffs' recordation of expenses accurately reflects value of their personal expenditures, it does not provide known standard of value for measuring damages in promissory estoppel case, as required for award of prejudgment interest; rather, damage assessment requires fact finder's case by case calculation of value of detrimental reliance on promise and, in assessing amount of damages, fact finder is guided by its best judgment, not known standard of value.

Michael P. Zaccheo, Salt Lake City, for appellant.

Wayne B. Watson and Thomas J. Scribner, Provo, for appellees.

Before BILLINGS, GREENWOOD and ORME, JJ.

GREENWOOD, Judge:

Defendant Aetna Casualty & Surety Company appeals a jury verdict awarding plaintiffs, Dana and Derek Andreason, damages based upon a promissory estoppel theory. On appeal, defendant claims that the trial court abused its discretion in refusing to either subject the jury award to remittitur or order a new trial. Plaintiffs cross-appeal, claiming that the trial court erred as a matter of law in refusing to grant them prejudgment interest on the jury award. We affirm the trial court's decision upholding the jury award without prejudgment interest.

BACKGROUND

Because the parties tried this case before a jury, we recite the facts in a light favorable to the jury verdict. *State v. Perdue*, 813 P.2d 1201, 1202 (Utah App.1991). On April 4, 1986, a fire extensively damaged plaintiffs' kitchen and garage, and caused smoke, electrical, and water damage throughout their home. Immediately after the fire and for the three weeks following, defendant's agents mistakenly represented to plaintiffs that their fire losses would be covered by their insurance policy with de-

fendant. A week after the fire, defendant's adjuster visited plaintiffs' burned home, instructed them on repairs, and authorized them to proceed. Plaintiffs immediately began extensive clean up and repair work consistent with the adjuster's instructions.

After three weeks, defendant discovered that it no longer insured plaintiffs because their fire insurance policy had been canceled six weeks prior to the fire. When defendant belatedly denied insurance coverage for their fire losses, plaintiffs sued.

In May 1991, plaintiffs' suit against defendant went to trial. The trial court had previously granted defendant a partial summary judgment, concluding that the insurance contract was canceled prior to the fire. The trial, therefore, continued solely on plaintiffs' promissory estoppel theory. During the trial, plaintiff Derek Andreason testified in detail about the extent, nature, and timing of the home repairs. He stated that he undertook \$41,957.69 worth of work, and that he did "all of the work" in detrimental reliance on defendant's promise of coverage. Mr. Andreason testified that defendant's agent provided detailed instructions on repairs and replacements that should be undertaken. For example, according to Mr. Andreason, the agent told him not to consider repairing some items, but to simply discard them and purchase new ones. These items included the living room carpet, the kitchen range, kitchen cabinets, a cedar wall, and the tile floor. Mr. Andreason claimed that without the promise of insurance coverage, he would have boarded up his home, gradually done the work himself, and repaired rather than replaced many items. By the time defendant repudiated its promise of coverage, however, repair work had proceeded beyond the point where plaintiffs' self-help plan was an option. The jury awarded plaintiffs damages of \$37,500.00.

Defendant filed a motion for a new trial or remittitur and objected to plaintiffs' request for prejudgment interest from the date they originally demanded payment for their repair costs. The trial court denied defendant's motion and issued a judgment

for plaintiffs without awarding prejudgment interest. This appeal followed.

ANALYSIS

Both defendant's appeal, seeking to vacate the jury award, and plaintiffs' cross-appeal, seeking to increase the award to include prejudgment interest, present issues related to the nature of damages in promissory estoppel. Defendant asks this court to determine whether the trial court abused its discretion in refusing to grant its motion for remittitur or a new trial, claiming that the damages awarded were excessive or unwarranted. On cross-appeal, plaintiffs question whether the trial court erred as a matter of law in failing to award them prejudgment interest, arguing that without prejudgment interest, their damage recovery was incomplete.

Promissory Estoppel

[1] Promissory estoppel is an equitable claim for relief which is normally tried to the bench. See *Tolboe Constr. v. Staker Paving & Constr.*, 682 P.2d 843, 849 (Utah 1984). The parties in this case apparently agreed to present their case to the jury. Utah Rules of Civil Procedure authorize the jury to act as a factfinder in an equity action. "In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." Utah R.Civ.P. 39(c); see *Willard M. Milne Inv. Co. v. Cox*, 580 P.2d 607, 609 (Utah 1978). Because the jury properly heard this promissory estoppel case, we need only determine if the trial court abused its discretion in refusing to grant a remittitur or a new trial. See *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 805 (Utah 1991).

[2-4] Because damage assessment is peculiarly a jury function, trial courts should exercise caution in setting aside a verdict and ordering a new trial on the basis of excessive damages. *Batty v. Mitchell*, 575 P.2d 1040, 1043 (Utah 1978).

A trial court enjoys broad discretion in this decision, as long as its grounds for granting a remittitur or a new trial fit one of the seven specified in Rule 59. See *Crookston*, 817 P.2d at 804. The pertinent three among these grounds include:

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

Utah R.Civ.P. 59(a)(5)-(7). The trial court should review the propriety of the damages award and grant a new trial only where it is obvious that the jury lacked a reasonable basis for its decision, acted with prejudice or passion, or disregarded competent evidence. *Crookston*, 817 P.2d at 803-05.

On reviewing the decision of the trial court to grant or deny a new trial, we do not directly review the verdict, "ignoring any intermediate actions by the trial court." *Id.* at 802. Instead we consider that "[w]hen the determination of the jury has been submitted to the scrutiny and judgment of the trial judge, his [or her] action thereon should be regarded as giving further solidarity to the judgment." *Id.* at 806 (quoting *Elkington v. Foust*, 618 P.2d 37, 41 (Utah 1980)). We, therefore, will reverse "the judge's ultimate decision to grant or deny a new trial, ... only if there is no reasonable basis for that decision," *id.* at 805, resolving any doubt in favor of the trial court, *id.* at 806.

Because the insurance contract between plaintiffs and defendant was cancelled when defendant offered to reimburse plaintiffs for the repairs necessitated by fire damage to their home, plaintiffs based their claim against defendant on promissory estoppel. Promissory estoppel may be invoked in circumstances where "equity recognizes the unfairness of permitting withdrawal of the promise and will enforce it." *Tolboe*, 682 P.2d at 846 (quoting *Union Tank Car Co. v. Wheat Bros.*, 15 Utah 2d 101, 387 P.2d 1000, 1003 (1964)). The necessary elements of promissory estoppel include: "(1) a promise reasonably expect-

Cite as 848 P.2d 171 (Utah App. 1993)

ed to induce reliance; (2) *reasonable reliance* inducing action or forbearance on the part of the promisee or a third person; and (3) *detriment* to the promisee or third person." *Weese v. Davis County Comm'n*, 834 P.2d 1, 4 n. 17 (Utah 1992) (emphasis added). Utah has also adopted the Restatement (Second) of Contracts section 90 describing promissory estoppel as follows: "'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.'" *Tolboe*, 682 P.2d at 845 (quoting Restatement (Second) Contracts § 90(1) (1981)).

The factual prerequisites for promissory estoppel are:

"that the defendants were aware of all the material facts; that in such awareness they made the promise when they knew that the plaintiff was acting in reliance on it; that the latter, observing reasonable care and prudence, acted in reliance on the promise and got into a position where it suffered a loss."

Id. at 845-46 (emphasis deleted) (quoting *Union Tank Car*, 387 P.2d at 1003).

Defendant argues that when the facts of plaintiffs' case are compared to the essential promissory estoppel elements, they are insufficient to justify plaintiffs' recovery. Although defendant concedes the presence of a clear promise and does not challenge the reasonableness of plaintiffs' reliance on that promise, it claims that plaintiffs deserve no recovery because either (1) plaintiffs did not do anything as a result of the promise that they would not have done

without the promise, or (2) plaintiffs' expenses merit no compensation because they provided a benefit and, accordingly, caused no detriment to plaintiffs. Thus, according to defendant, plaintiffs' damages were the result of the fire, not defendant's promise, and plaintiffs benefitted from the repairs and replacements. For these reasons, defendant asserts that plaintiffs failed to prove entitlement to damages. Defendant also asserts that even if plaintiffs proved an entitlement to damages, they provided insufficient evidence from which to calculate damages.

Utah's appellate courts have not focused on the claims asserted by appellant. However, Utah's adoption of the Restatement (Second) version of section 90 does provide useful guidance for considering these issues.¹ The Restatement (Second) infused a more flexible approach into both the substantive and remedial aspects of promissory estoppel. John D. Calamari & Joseph M. Perillo, *Contracts*, § 6-1 at 273 n. 19 (3rd ed. 1987) (discussing Restatement (Second), Contracts § 90 cmt. b). This modification allows for expanded application of a promissory estoppel theory and concomitantly allows remedies consistent with "the extent of the reliance." *Id.* at 273 (emphasis added).

The trial court's Jury Instruction No. 20, which was not challenged by either party, accurately reflects this flexible concept of promissory estoppel: "Damages in promissory estoppel are limited to those which are sustained because the plaintiffs have changed their position to their detriment in reasonable reliance upon the defendant's representations. They must have done some act which they otherwise would not have done. Only acts done in detrimental

1. Earlier Utah cases had adopted the former Restatement of Contracts section 90 (1932) which reads as follows: "'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" *Southeastern Equip. Co. v. Mauss*, 696 P.2d 1187, 1188 n. 1 (Utah 1985) (emphasis added). During the period of time that this first Restatement provided

the guidelines for promissory estoppel, Utah courts treated the doctrine as a consideration substitute, triggering full compensatory damages, but limited its availability to situations where the injury to plaintiffs was so unjust and unconscionable as to constitute near fraud, *see Easton v. Wycoff*, 4 Utah 2d 386, 295 P.2d 332, 333-35 (1956), or the promisor "manifested an intention to abandon an existing right," *see Ravarino v. Price*, 123 Utah 559, 260 P.2d 570, 575 (1953).

reliance are compensable." While this instruction required the jury to limit damages to those caused by detrimental reliance, it did not require that all the effects of plaintiffs' actions be of no benefit to them. The instruction is likewise consistent with cases allowing promissory estoppel actions to proceed where plaintiffs nonetheless benefitted in some fashion from acts taken in detrimental reliance on the promise of another. For example, in *Northside Auto Serv. Inc. v. Consumers United Ins.*, 25 Wash.App. 486, 607 P.2d 890, 892-93 (1980), the court affirmed a jury verdict enforcing an insurer's promise to pay for the insured's automobile repairs, although the insurer later denied policy coverage. See also *Tynes v. Bankers Life Co.*, 224 Mont. 350, 730 P.2d 1115, 1123 (1986) (upholding a jury finding of promissory estoppel and damages where insurer had promised to pay for critically needed psychological treatment); *Huhtala v. Travelers Ins. Co.*, 401 Mich. 118, 257 N.W.2d 640, 647 (1977) (remanding for trial on claim that insurer's promise to provide coverage for plaintiff's injuries resulting from automobile accident was enforceable).

[5] Plaintiffs argue, and we agree, that a promissory estoppel claim should not fail for lack of damages on the sole basis that plaintiffs received a benefit. In the cases noted, where plaintiffs obtained medical treatment or repaired a car, the doctrine of promissory estoppel was applied to enforce a promise and prevent injustice, as determined by the factfinder. While the damages must be limited to those incurred through reasonable reliance, the flexible and equitable nature of promissory estoppel allows for damages even where the plaintiff receives a benefit such as improved health, a repaired car, or a repaired home.

[6, 7] In our view, plaintiffs presented to the jury sufficient evidence to allow the jury to determine an entitlement to promissory

estoppel damages and to calculate their value. An award of damages requires that a plaintiff prove the fact of damages by a preponderance of the evidence and the amount of damages by approximations and projections that rise above mere speculation. See *Atkin Wright & Miles v. Mountain States Tel.*, 709 P.2d 330, 336 (Utah 1985).

Mr. Andreason meticulously testified from his personal written records of expenses,² that the repairs for which he sought recovery were undertaken because of defendant's representation and would not otherwise have been done. Plaintiffs followed the adjuster's instructions in throwing out water damaged carpet that they otherwise might have cleaned, discarding the kitchen stove and cabinets they otherwise might have repaired, replacing weakened floor joists they might have reinforced, and tearing out a burned cedar wall and tile floor they might have cleaned and left.³

From this evidence, the jury could reasonably infer that adhering to defendant's plan of immediate professional repair required plaintiffs to forego their option of gradual self-help and necessitated additional expenses. Based on this inference, the jury could reasonably conclude that plaintiffs' actions constituted both a change of position and detriment. Defendant's retrospective analysis of some beneficial effect does not prevent the jury from finding a detriment suffered in reliance on defendant's promise and the injustice that would occur if the promise were not enforced to the extent of reliance.

As the factfinder in this case, the jury also was responsible for assigning a value to damages that reflected the extent of plaintiffs' detrimental reliance. Plaintiffs actually argued that they should be reimbursed for the *full* cost of all the repair work done on their fire damaged home

2. The written records were ruled inadmissible by the trial court, upon defendant's objection. Mr. Andreason, however, referred to and refreshed his memory from these records throughout his testimony.

3. Defendant did not present any expert testimony of its own as to reasonable repairs or costs, but rather elected only to challenge Mr. Andreason's calculations and credibility through cross-examination.

during the three week period because they would not have undertaken *any* of their reparative actions without defendant's promise of insurance coverage. The evidentiary value and credibility of this assertion were properly subjected to the jury's assessment. "[I]n a jury trial, 'it is within the exclusive province of the jury to judge the credibility of the witness and the weight of the evidence.'" *State v. Larsen*, 834 P.2d 586, 589 (Utah App.1992) (quoting *State v. Howell*, 649 P.2d 91, 97 (Utah 1982)). Considering the evidence presented to the jury, an allocation of approximately 90% of plaintiffs' expenses as representing the extent of damages due to detrimental reliance was not contrary to the law. The trial court, having observed all evidence and testimony, was not persuaded that the jury's verdict lacked a reasonable basis, was motivated by prejudice or passion, or that the jury had disregarded competent evidence. Therefore, the trial court did not unreasonably deny defendant's motion for a new trial or remittitur.

Prejudgment Interest

[8] In their cross-appeal, plaintiffs assert that the trial court erred in not awarding them prejudgment interest on the jury's damages award. The trial court's decision on plaintiffs' entitlement to prejudgment interest presents a question of law which we review for correctness. *Vali Convalescent & Care Insts. v. Division of Health Care Fin.*, 797 P.2d 438, 444 (Utah App.1990); *Hermes Assocs. v. Park's Sportsman*, 813 P.2d 1221, 1223 (Utah App.1991). Consequently, "we need not accord any particular deference to the decisions below." *Vali*, 797 P.2d at 444 (citing *Hurley v. Board of Review*, 767 P.2d 524, 526-27 (Utah 1988) (agency decision); *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985) (trial court decision)).

Plaintiffs argue that by establishing the threshold facts of promise, reliance and damage, they created an entitlement to full compensation for their expenses, including interest on the money expended six years previously. According to plaintiffs, their right to full compensatory damages includes prejudgment interest as a matter of

law because (1) their damages were sufficiently fixed at the time that they incurred expenses to repair their home, and (2) prejudgment interest is appropriate because "the damages claimed were with reference to the value of the repair of damaged property."

[9-11] The Utah Supreme Court first discussed the rationale behind prejudgment interest in *Fell v. Union Pacific Ry. Co.*, 32 Utah 101, 88 P. 1003, 1005-06 (1907). The *Fell* court stated that because awarding damages at law was intended to return a plaintiff to the status quo, prejudgment interest could be available where necessary to accomplish full compensation. *Id.* In Utah, prejudgment interest may be awarded in situations where the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time. *Bjork v. April Industries, Inc.*, 560 P.2d 315, 317 (Utah 1977), *cert. denied*, 431 U.S. 930, 97 S.Ct. 2634, 53 L.Ed.2d 245 (1977). Although damages may be unliquidated, they must be calculable through a mathematically certain procedure allowing the court or the jury to fix the amount by following "fixed rules of evidence and known standards of value ... rather than be[ing] guided by their best judgment in assessing the amount" or evaluating elements lacking fixed standards by which to measure their value. *Fell*, 88 P. at 1007; *Price-Orem v. Rollins, Brown & Gunnell*, 784 P.2d 475, 483 (Utah App.1989). If sufficient certainty exists, courts should allow interest from the time when damages became fixed, rather than from the date of the judgment. *Bjork*, 560 P.2d at 317. However, "where 'damages are incomplete and are peculiarly within the province of the jury to assess at the time of trial,' then prejudgment interest is inappropriate. *Price-Orem*, 784 P.2d at 483 (quoting *Fell*, 88 P. at 1006).

[12] Plaintiffs argue that the amount of their expenditures to repair the property damage caused by the fire determined their damages and that their conscientious and credible recording of repair expenses created the necessary mathematical certainty.

We find, however, that while plaintiffs' recordation of expenses may accurately reflect the value of their personal expenditures, it does not provide a known standard of value for measuring damages in a promissory estoppel case. Instead, damage assessment based on the Restatement (Second) version of promissory estoppel requires a factfinder's case by case calculation of the value of detrimental reliance on a promise. Furthermore, "[t]he remedy granted may be limited as justice requires." Restatement (Second) Contracts § 90(1) (1981): Damages, therefore, do not become fixed before a factfinder quantifies the injustice caused by detrimental reliance. In assessing this amount, the factfinder is guided by its best judgment, not a known standard of value.

We also disagree with plaintiffs' assertion that prejudgment interest is particularly appropriate because their claim refers to the repair of property damage. Unlike the case before us, in the cases cited by plaintiffs, courts awarding prejudgment interest found defendants responsible for actual damage to the plaintiffs' property under tort theories. See *Uinta Pipeline Corp. v. White Superior Co.*, 546 P.2d 885, 887 (Utah 1976) (finding contractor's negligence in setting up a natural gas compressor station responsible for the fire which completely destroyed it); *Fell*, 88 P. at 1003-07 (finding that the railroad's delay in shipment caused the death of some of plaintiff's sheep and the weight loss in others). Under circumstances where a defendant was directly responsible for the property damage, courts have found "no question about the propriety of allowing interest for the destruction of personal property prior to judgment where value can be measured by facts and figures." *Uinta*, 546 P.2d at 887 (discussing *Fell*).

In this case, however, we note that defendant did not directly cause any harm to plaintiffs' property. The fire caused the property damage; defendant only impacted plaintiffs' method of repairing pre-existing

property damage. Furthermore, in contrast to a tort action for property damage, the recovery properly awarded under a promissory estoppel theory reflects the extent of reliance. To separate the damage for which defendant must accept responsibility from expenses which would have occurred in the absence of defendant's promise requires the determination of a factfinder. Factual evaluation of this type lacks mathematical certainty prior to final determination and requires case by case analysis. When "the amount of the damage must be ascertained and assessed by the trier of the fact at the trial," prejudgment interest is inappropriate. *Price-Orem*, 784 P.2d at 482⁴ (quoting *Bjork*, 560 P.2d at 317).

We, therefore, find that the trial court properly refused to allow plaintiffs prejudgment interest on a jury award based on promissory estoppel.

CONCLUSION

In developing promissory estoppel as an equitable cause of action, Utah has incorporated flexibility into both the elements of the substantive doctrine and the measure of its reliance remedy. A finding that promissory estoppel is applicable requires the factfinder to determine the plaintiff's recovery by calculating the portion of total expenses reflecting actual, detrimental reliance. In upholding the promissory estoppel award determined by the jury, the trial court did not abuse its discretion. We also find that the trial court correctly denied pre-judgment interest on that award.

Affirmed.

BILLINGS, J., concurs.

ORME, J., concurs in result only.



4. The *Price-Orem* court found that a developer was not entitled to prejudgment interest against his surveyor because the amount of damage for which defendant was responsible was too specu-

lative for prejudgment interest, despite the fact that the loss was fixed as of a date certain. *Id.* at 482-83.

1 A No. It was insufficient to pay all of our bills
2 within three months after Mark and I purchased the store.

3 Q Mr. Van Alstyne, you testified that you did not
4 confer with Mr. Walsh about the sale of the business
5 beginning in the fall of 1985, is that correct?

6 A Yeah.

7 Q You did not confer with him then concerning the
8 winding down of the business and the sale of the assets?

9 A Oh, I had earlier. I had earlier.

10 Q Well, that was prior to his selling to Ms. Erickson
11 though, wasn't it?

12 A After he had reported to me that he had, that he
13 was walking out.

14 Q But you did testify that you did in fact report
15 to Ms. Erickson the full terms of the sale of the assets of
16 the partnership, is that correct?

17 A The full terms of the sale of the assets?

18 Q Yes. In the spring.

19 A Like May, '86?

20 Q '86.

21 A Right. I did.

22 Q And did you in fact distribute to her some of the
23 unsold assets of the partnership?

24 A Right.

25 Q Were any of the unsold assets of the partnership

1 point, she knew we were talking to V.R. Business Brokers.
2 Then they referred me to Helen Hooper, who listed the
3 business. Then they had a meeting with my attorney and her
4 attorney. And I believe, I think--and I may be wrong, but
5 I think Mr. Walsh was there. But my attorney told them
6 that this store is listed on the market to be sold. And
7 we also had an appraisal price.

8 Q That was the extent of your informing Jude
9 Erickson all along the way?

10 A Well, no. Oh, we kept her posted. I sent her,
11 I think twice, well, maybe more than once, but twice, a
12 letter telling her what is happening.

13 Q Why did you send her a letter and she wasn't an
14 employee any more?

15 A Well, again, she kept, you know, they were going
16 to sue me. You know, she had--she was working with an
17 attorney who was coming after me on the grounds alleging
18 that I am preventing her from her rights in this video
19 business, and about--good heavens, just trying to stay
20 alive.

21 Q Okay. Then when you finally sold it the following
22 June of '86, you said that you didn't sell all the assets,
23 that some of the assets you kept and some you gave to
24 Erickson.

25 A These are assets that Video U.S.A. did not want to

1 buy. They could not use them.

2 Q What were they?

3 A Well, there was a T.V. and then some Beta movies
4 that were damaged, and a video camera that was broken. And
5 I think a cash register and some office supplies. Those, I
6 gave to Jude. We purchased two video recorders.

7 Q Who is "we"?

8 A My wife and I. So, we made out a check and
9 purchased the two video recorders. I took the T.V.,
10 because the video store had purchased out of my own pocket
11 and I paid a carpet cleaning bill earlier that spring.
12 And I reimbursed myself for that with some other supplies.

13 Q Let's move on to the proceeds from this contract
14 of sale in June, '86, with Video U.S.A.

15 A Uh huh (affirmative).

16 Q Who received those proceeds?

17 A Well, Gerald and I.

18 Q The reason I'm asking is, I heard Mr. Crawley
19 ask you, said Robinson had gotten all of the proceeds from
20 that; is that true?

21 A Well, I'm sorry, no. I've taken Gerald and I've
22 split them. I used my proceeds to pay my legal costs
23 since Mark initiated this action against me.

24 Q So you split it equally. Those payments were
25 how much a month?

1 Q Which were what? Were they your personal books?
2 I mean, which ones?

3 A Right. These are different.

4 Q Which one is right, this one or the one Mary Ann
5 prepared?

6 A I prepared this just as a general ballpark when
7 I was consulting with you as to what at the very least would
8 be the outstanding debt that I am in the hole, out these
9 dollar amounts. At the very least. I didn't really work
10 into any consideration with respect to interest accruing
11 there. I was just trying to get a general idea.

12 MS. MAUGHAN: Thank you. That's all.

13 THE COURT: Any questions?

14 MR. CRAWLEY: No questions.

15 THE COURT: All right. You may step down.
16 Anything further?

17 MS. MAUGHAN: No.

18 THE COURT: Defense rests?

19 MS. MAUGHAN: Yes.

20 THE COURT: All right. As I indicated in
21 chambers and at the request of the parties, we will take
22 final argument in the form of simultaneous submitted
23 memorandums. And I would like, in that regard, your
24 specific input as to the questions I raised, those being
25 mutual mistake of law in relation to the Walsh/Erickson

1 contract, the question of what in fact could or should have
2 been sold there.

3 I would like your road map. I think it's, as I
4 said in chambers, it's fairly clear as to the position of
5 the plaintiff in relation to the relief sought. I'm not
6 now that clear in relation to the dollars and cents on the
7 claim for relief under the counterclaim, because the
8 evidence has altered it somewhat from the claims as set
9 forth in the pleadings. But as to the plaintiff's claim
10 that there is a change or alteration in those figures, I
11 would like there to be all the evidence out and in the
12 open to tell me what our bottom line is.

13 Both counsel can see the conflict in the evidence
14 as well as I can. Please comment on it and tell me what
15 you think I ought to believe and why, and any case
16 citations you have, would you set them forth. I would be
17 glad to look them up, or if you want to set forth pertinent
18 quotes and again, give me four cases on one point as an
19 irras~~cible~~le and inflated jurist used to say, just give me
20 your best case. And that's the only thing he ever did that
21 I liked him for. Everything else then, he was not much of
22 a jurist, but that's all right.

23 Anything further then this afternoon?

24 MR. CRAWLEY: What date?

25 THE COURT: You want to pick a date? Let's see,